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Supreme Court, U.S.
FILED

08 127 JUL 21 2003

No.

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IN THE

Supreme Court of the United States

ALVIN GLENN TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a prisoner who has begun to serve his term of imprisonment in a county jail under a state sentence falls under the "anti-shuttling" protections of the Interstate Agreement on Detainers Act, 18 U.S.C. App. 2 as interpreted by this Court's opinion in *Alabama v. Bozeman,* 533 U.S. 146 (2001)?

2. Whether a prisoner who has made a timely objection to a clear violation of 18 U.S.C. App. 2 and has exhausted his appeal options has any recourse under 28 U.S.C. § 2255?

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PETITION FOR A WRIT OF CERTIORARI

Alvin Glenn Taylor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

Taylor's conviction was affirmed by the Sixth Circuit in *United States v. Taylor*, 173 F.3d 538 (6th Cir. 1999), *cert. denied*, 528 U.S. 987 (1999). The Sixth Circuit later affirmed the District Court's denial of Taylor's motion to vacate sentence filed pursuant to 28 U.S.C. § 2255 in an opinion dated February 5, 2003 which was not recommended for full-text publication. A copy of that opinion is reproduced in the Appendix at 3a.

BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit which is sought to be reviewed was entered on February 5, 2003. An application for rehearing or rehearing *en banc* was denied on April 22, 2003. (App. at 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provision is involved in this case:

The Compact Clause of the United States Constitution, which permits compacts, with congressional consent, such as the Interstate Agreement on Detainers: "No state shall, with-

out the consent of congress, . . . enter into any agreement or compact with another state." U.S. Const., art. I, § 10, cl. 3.

The statutory provisions involved in this case are found in the Interstate Agreement on Detainers Act (hereinafter "IAD"), codified at 18 U.S.C. App. 2, § 2, which is contained in the Appendix at 31a-43a. The portions most pertinent to the issues in this case are found in Article IV of the IAD, which is the article that applies when the prosecutor requests the prisoner. Article IV provides a means for the prosecutor to obtain custody of the prisoner:

> The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated . . . .

IAD, art. IV(a). Article IV also contains a sanction if the prisoner is returned to the original jurisdiction prior to trial in the receiving State:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e)

> hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

IAD, art. IV(e). The other statutory provision involved in this case is 28 U.S.C. § 2255 which states in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

STATEMENT OF THE CASE

This case arises out of the multiple transfers of custody of Alvin Glenn Taylor between state authorities in Shelby County, Tennessee and federal authorities, and it involves the application of the Interstate Agreement on Detainers Act, to which both Tennessee and the federal government are Member States. The relevant facts are undisputed and can be found in the opinions reproduced in the Appendix.

A. Relevant Events Occurring Prior To Trial And In The Trial Court.

The Memphis police arrested Taylor on October 9, 1995 in connection with the robbery of a gas station; at the time Taylor was on parole for a previous Tennessee conviction. *United States v. Taylor*, 173 F.3d 538, 539-540 (6th Cir. 1999). (App. at 21a-23a) Following his arrest, he was placed in the Shelby County Jail which is characterized as "'a holding facility for pretrial detainees.'" *Id.* at 540. (App. at 23a) Taylor's parole was revoked at a hearing on January 12, 1996, but "he remained in the Shelby County Jail awaiting transfer to a state correctional facility." *Id.* (App. at 23a)

The basis for federal jurisdiction in this case occurred when Taylor was charged with violations of federal law in connection with the gas station robbery. A federal grand jury indicted Taylor on February 27, 1996 "for robbery affecting commerce in violation of 18 U.S.C. § 1951; using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c); and being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g), 924(e)." *Id.* at 539, 540. (App. at 22a-24a) A detainer was lodged against Taylor by the federal government on February 28, 1996. *Id.* at 540. (App. at 24a)

> On March 20, 1996, pursuant to a writ of habeas corpus ad prosequendum, a United States Marshal transported Taylor from the Shelby County Jail to federal court in Memphis for his initial appearance before a magistrate, and returned him immediately thereafter

> to the county jail. Between that date and April 4, 1996, when his arraignment and detention hearing were finally held, Taylor was brought to federal court four times for his detention hearing; each time Taylor requested and was granted a continuance. On April 4, 1996, Taylor pled "not guilty;" the court set a trial date and entered an order of detention pending trial; and Taylor was returned to the Shelby County Jail.
>
> On April 18, 1996, Tennessee authorities transferred Taylor to the Mark Luttrell Reception Center, a Tennessee Department of Corrections ("T.D.O.C.") facility, to serve his parole violation sentence. U.S. Marshals then lodged a new detainer with the T.D.O.C. and on June 20, 1996, pursuant to a new writ of habeas corpus ad prosequendum, Taylor was taken before the federal district court for another hearing. After that court appearance, Taylor remained in federal custody.

Id. (App. at 24a) Taylor made a motion to dismiss the indictment because of the violation of the "anti-shuttling" clause of the IAD, but the motion was denied by the district court.[1] *Id.* at 539-540. (App. at 22a-25a) The jury con-

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[1]The Sixth Circuit incorrectly cites IAD, art. III(d) which would have applied if Taylor had initiated his transfer. The correct citation should be to IAD, art. IV(e) since the government initiated the temporary transfer of custody.

victed Taylor of the robbery and of being a felon in possession of a firearm. *Id.* at 540. (App. at 22a) A mistrial was declared on the remaining count because the jury could not reach a verdict, and that count was then dismissed. *Id.* (App. at 22a) "The court sentenced Taylor to life imprisonment for the robbery count pursuant to the federal "three strikes" statute, 18 U.S.C. § 3559(c), and a consecutive 424 months for being a felon in possession of a firearm." *Id.* at 539-540. (App. at 22a)

B. Relevant Issues On The Direct Appeal.

The United States Court of Appeals for the Sixth Circuit held that Taylor was not entitled to the anti-shuttling protections of the IAD and affirmed Taylor's convictions. *United States v. Taylor*, 173 F.3d 538-539 (6th Cir. 1999). (App. at 21a) The Sixth Circuit noted that "[t]here is sharp disagreement among courts as to whether the IAD is triggered when a detainer is lodged against a convicted and sentenced prisoner who is being held in temporary custody pending a transfer to his permanent incarceration." *Id.* at 541. (App. at 25a)

> After reviewing the relevant cases from this circuit and those of our sister circuits and the reasoning behind the IAD, we conclude that "correctional facility" is correctly understood as meaning the state facility to which the Defendant is ultimately assigned, not the local facility in which he sits awaiting transfer to that facility.

Id. at 541. (App. at 26a) The Sixth Circuit also adopted a *de minimis* rationale.

> Even if we concluded that "correctional facility" includes the county jail, we would find no violation of the IAD in this case. During a 16 day period, Taylor was shuttled back and forth between the state facility and federal court a total of six times, four of which were attributable to the his own requests for continuances. Each time, Taylor was returned to the county jail the same day. Numerous circuit courts have held that such quick, temporary transfers do not violate the IAD.

Id. (App. at 27a) This Court denied Taylor's petition for a writ of certiorari. *Taylor v. United States*, 528 U.S. 987 (1999).

C. Relevant Issues On The Motion To Vacate Sentence Pursuant to § 2255.

On November 7, 2000, Taylor filed a motion to vacate his sentence. (App. at 8a) He amended his motion on August 7, 2001 to include his claim regarding the IAD violations after this Court decided *Alabama v. Bozeman*, 533 U.S. 146 (2001). (App. at 8a, 11a) The District Court dismissed all of Taylor's claims except that relating to violations of the IAD. (App. at 9a) The District Court noted that "the Supreme Court's decision in *Bozeman* appears to be inconsistent with the Sixth Circuit's second basis for rejecting Taylor's IAD claim on direct appeal." (App. at 12a) The District Court distinguished the present case from *Reed v. Farley*, 512 U.S.

339 (1994), which "held that a defendant may not raise an IAD claim" on collateral review "when he did not raise a timely objection prior to trial." (App. at 12a) Notwithstanding that distinction, the District Court held that "Taylor's IAD claim is not cognizable on a § 2255 motion." (App. at 15a) Moreover, the District Court found that "the Sixth Circuit's first basis for rejecting the claim on direct appeal, that Taylor had not begun serving his 'term of imprisonment' in a 'correctional institution' while he was being held at the Jail," had not been overruled by *Bozeman*. (App. at 15a) Accordingly, the District Court held that the "law of the case" doctrine prohibited it from revisiting this issue, and it concluded that "[f]or that reason alone, Taylor's motion must be denied." (App. at 16a) Nevertheless, the District Court granted a certificate of appealability on the IAD issue. (App. at 18a)

D. Relevant Issues On The Collateral Appeal.

Upon appeal, the Sixth Circuit noted that "[t]he district court initially concluded that there was nothing in Taylor's action to excuse him from the general rule that § 2255 relief cannot be premised upon an IAD violation." (App. at 6a) The opinion also noted that "[t]he district court held that, even if Taylor's IAD/*Bozeman* claim were cognizable in a motion to vacate sentence, the Sixth Circuit's prior refusal to characterize Taylor's Shelby County Jail time as an IAD 'term of imprisonment' foreclosed to him that avenue for relief." (App. at 6a)

The Sixth Circuit did not further address the issue of whether § 2255 relief is available for IAD violations. How-

ever, because the opinion claimed that *Bozeman* "did not touch upon in any way the Sixth Circuit's interpretation of 'term of imprisonment'" in the context of transfers between jurisdictions, the Sixth Circuit held that "[t]he district court's latter conclusion, concerning the substance of the 'term of imprisonment' holding, is supported by law," namely, the law of the case doctrine which meant that the district court "was not free to revisit the Sixth Circuit's prior refusal to invoke the IAD in response to Taylor's temporary, pre-trial residence at the Shelby County Jail." (App. at 6a-7a)

The district court's judgment was, therefore, affirmed. (App. at 7a) A request for rehearing was denied. (App. at 1a)

ARGUMENT

There are two basic issues before the Court: Is the IAD to be enforced as it is written? And, does a prisoner have any recourse when courts refuse to enforce a clear violation of the IAD? The answer to both questions must be unequivocally "yes," or the IAD will be a law that "has wax teeth and is little more than a legislative exercise in futility." *People v. Esposito*, 37 Misc. 2d 386, 391, 201 N.Y.S. 83 (1960).

A. The Language Of The Statute Is Not Ambiguous And Must Be Given Its Plain Meaning.

Article IV of the IAD deals with a situation when a detainer has been lodged and there is a request for a prisoner "who is serving a term of imprisonment in any party state." IAD, art. IV(a). There is no dispute that Taylor began serv-

ing a term of imprisonment for Tennessee, a party to the IAD, on January 12, 1996 when his parole for a prior Tennessee conviction was revoked. Nor are there any disputes that he was not indicted and that a detainer lodged on the federal charges was not filed until a month and a half later. Nevertheless, the Sixth Circuit found an implicit exception to the plain meaning of "term of imprisonment" by holding that it did not apply unless the prisoner had been moved from a jail to a prison. However, "the language of the Agreement militates against an implicit exception, for it is absolute." *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). Although the opinions in the present case try to assert that the *Bozeman* opinion only deals with transfers of short duration, the distinction that the Sixth Circuit makes regarding jails and prisons is no less an implicit exception than the "trivial violations" argued by the petitioner in *Bozeman*. If *Bozeman* stands for anything, it is that the language of the IAD is absolute and must be read literally.

B. The Statute Only Requires That A Prisoner Be Serving A Term Of Imprisonment, Not That The Prisoner Be Housed In A Prison.

It would certainly come as a surprise to most prisoners to learn that they are not incarcerated when they are in a county jail! Someone who is legally confined and is serving a state sentence surely falls under the plain language of Article IV of the IAD. *See Escalanti v. Superior Court*, 165 Ariz. 385, 388, 799 P.2d 5 (Ariz. Ct. App. 1990) ("The clear language of the Agreement applies its speedy trial guarantee to both those in prisons and those in jails."); *Felix v. United States*,

508 A.2d 101, 106 (D.C. App. 1986) ("a prisoner's operative rights under the Act arise once the prisoner begins serving a term of imprisonment"). This is particularly true in this time when overcrowded prisons are forcing some prisoners to serve out their entire sentences in county jails or when prisoners are housed across state lines or in private prisons under contract with the state. *See Escalanti v. Superior Court*, 165 Ariz. 385, 389 n.5, 799 P.2d 5 (Ariz. Ct. App. 1990) (the state's "capacity to transfer an inmate from a rehabilitative facility to a non-rehabilitative one prevents making any fair and consistent distinction between jails and prisons"). The "term of imprisonment" specified in Article IV(a) is a temporal reference that directly correlates with the prisoner's timesheet or credit on the sentence and is not a geographical reference except with regard to his custody being in the party State. For the Sixth Circuit to assert that the IAD applies to only those prisoners housed in prisons is to imply that any others have no protections under the IAD (*e.g.*, not being able to make requests for disposition under Article III) and possibly no other rights as well (*e.g.*, "good time" or credit for time served).

The relevant portion of the IAD in the present case is Article IV(a) which is applicable when the prosecutor requests the temporary custody of "a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State." These conditions were all met: a detainer had been lodged against Taylor, his presence was re-

reuested by the federal government,[2] and he was serving a term of imprisonment in Tennessee which is a Member State of the IAD. Nevertheless, the Sixth Circuit has added another condition, namely, that the prisoner must be in something that is called a "prison" and not something called a "jail."

The Sixth Circuit itself introduces the words "correctional facility" into the case although such a phrase appears nowhere in Article IV and, in fact, nowhere in the entire IAD. *United States v. Taylor*, 173 F. 3d 538, 541 (6th Cir. 1999) ("we conclude that 'correctional facility' is correctly understood as meaning the state facility to which the Defendant is ultimately assigned"). (App. 26a) Article III(a) speaks of "a person who has entered upon a term of imprisonment in a penal or correctional institution of a party state," but Article IV(a) only refers to a prisoner "who is serving a term of imprisonment in any party state."[3] Again, the operative word is "term" rather than the Sixth Circuit's innovation, "correctional facility."

Moreover, even if one makes a distinction between jails and prisons, it would only apply to Article III transfers. The prisoner "in a penal or correctional institution" is in a posi-

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[2]Once a detainer has been lodged, the IAD is implicated, and a writ of *habeas corpus ad prosequendum* is the equivalent of "a written request for temporary custody" under Article IV(a) of the IAD. *United States v. Mauro*, 436 U.S. 340, 361-362 (1978).

[3]Note also the Sixth Circuit's apparent confusion about whether Article III or Article IV applies to this case as pointed out *supra* in footnote 1.

tion to decide whether the benefits of rehabilitation outweigh the benefits of resolving any detainers and thus can decide whether to initiate the temporary change of custody under Article III. On the other hand, the prisoner requested under Article IV has no such discretion; when requested, he must be produced, so it is necessary that such a prisoner only be required to be sentenced and "serving a term of imprisonment."

C. Certiorari Should Be Granted In This Case To Resolve The Conflicts Among The Various Jurisdictions.

When there are disagreements between various jurisdictions to a compact, it is desirable that certiorari be granted in order that there be a uniform interpretation. The present case offers such an opportunity to unify the application of the IAD throughout all of the Member States. *United States v. Taylor* notes that *Runck v. State*, 497 N.W.2d 74 (N.D. 1993), has a cogent summary of the reasoning behind the "sharp disagreement among courts as to whether the IAD is triggered when a detainer is lodged against a convicted and sentenced prisoner who is being held in temporary custody pending a transfer to his permanent incarceration." *United States v. Taylor*, 173 F.3d at 541. (App. at 25a) As in previous splits regarding the IAD, the two positions fall into those who cannot believe that the language of the statute means what it says (and therefore fail to follow it) and those who express moral outrage at the State's blatant disregard for the plain language of the statute.

We recognize that courts disagree over-whether the IAD is triggered when a detainer is lodged against a prisoner while that prisoner, after sentencing, is held in temporary custody in a jail or other facility awaiting transport to a correctional institution. Courts which rule that a detainer lodged against a prisoner in temporary custody is of no effect and does not bring the IAD into play reason that, because the basic purpose of the IAD is to prevent interference with institutional care and rehabilitation, which is not normally available at a facility or jail designed for temporary custody of prisoners, "one cannot interrupt that which has not yet started. *Crooker v. U.S.*, 814 F.2d 75, 77 (1st Cir. 1987). *See also United States v. Glasgow*, 790 F.2d 446 (6th Cir. 1985), *cert. denied*, 475 U.S. 1124, 106 S.Ct. 1647, 90 L.Ed.2d 191 (1986); *United States v. Wilson,* 719 F.2d 1491, 1495 n. 1 (10th Cir. 1983); *Lublin v. Johnson,* 628 F. Supp. 1496 (D.Ct.E.D.N.Y. 1986); *Dorsey v. State,* 490 N.E.2d 260 (Ind. 1986); *State v. Wade,* 105 Nev. 206, 772 P.2d 1291 (1989); *People v. Reilly,* 136 A.D.2d 355, 527 N.Y.S.2d 234 (1988). Courts which decline to distinguish between temporary and correctional custody in establishing the point at which the protections of the IAD become applicable reason that a rule encompassing all post-sentence confinement would be easier to

> apply, would avoid the possibility of encouraging the sending state to extend the period of confinement in a temporary facility because of outstanding detainers, and would alleviate judicial examination of an individual prisoner's rehabilitative status while in temporary confinement whenever an IAD claim is raised. *See Escalanti v. Superior Court,* 165 Ariz. 385, 799 P.2d 5 (Ct.App. 1990); *Hughes v. District Court In & For City, Etc.,* 197 Colo. 396, 593 P.2d 702 (1979); *Felix v. United States,* 508 A.2d 101 (D.C.Ct.App. 1986); *State v. Lock,* 839 S.W.2d 436 (Tenn. Ct.Crim.App. 1992).

Runck v. State, 497 N.W.2d 74, 81 (N.D. 1993). The *Runck* opinion actually rejected both positions, holding that there should not be strict application of the IAD when there was a *de minimis* effect on rehabilitation[4] but also holding that "applying a rule that the IAD's protections are simply inapplicable not only allows a party state to circumvent its obligations under the Agreement, but also implicates the very evils the IAD was intended to rectify. *Id.*

The *Runck* opinion held that in order for the IAD not to apply, the State would have to establish that Runck would

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[4]*Bozeman*, of course rejected the notion that there are exceptions for *de minimis* violations of the IAD. *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (not accepting the argument that "any violation is 'technical,' 'harmless,' or '*de minimis*'" because the shuttling "did not interrupt rehabilitation significantly").

have stayed at the jail for the same length of time even if the detainer had not been lodged. *Id.* at 82. Thus, there are three incompatible positions which certiorari review would resolve: 1) a strict inapplicability of the IAD to jails, 2) a literal enforcement of the language of the IAD, and 3) a requirement that there be judicial inquiry into the specific facts of each case and a weighing of those facts in order to determine whether or not to apply the IAD.

D. The IAD Contains A Bright Line Test That Is Simple, Workable, And Comports With The Strict Interpretation Of The Statute.

There is a "bright line" test for determining when dismissal with prejudice is mandated, and that test is contained within the literal language of the statute. Adding additional unwritten tests in order to achieve a specific result (i.e., avoiding enforcement of the IAD by refusing to dismiss the indictment when there has been a clear shuttling violation) requires extensive judicial inquiry into matters outside the jurisdiction and competence of the court of the receiving State and inevitably produces protracted litigation and appeals. For example, under the rationale of the *Taylor* opinion, the court had to determine the nature of the Shelby County Jail and then had to analyze the character of the Mark Lutrell Reception Center and conclude that the latter was the state facility to which Taylor was ultimately assigned.[5]

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[5]Given that this state facility has the appellation "reception center," one has to wonder whether it was even appropriate to say this was Taylor's

In contrast, the bright line contained in the statute makes the inquiry simple for the court of the receiving State: Did the receiving State lodge a detainer? Was the prisoner serving a term of imprisonment in the sending State? Was the prisoner transferred to the receiving State? Has there been a transfer back to the sending State before trial? If so, has there been a waiver? *See New York v. Hill*, 528 U.S. 110, 117-118 (2000) (IAD rights can be waived). If not, then the case must be dismissed. This simple statutory scheme produces efficient results, avoids inconsistencies, and protects the interests of both the prisoner and the sending State.

The proposal that some violations can be balanced against some larger concerns – such as whether the prisoner is in a jail or a prison – because they cause no prejudice to the prisoner and do not interrupt rehabilitation is foreign to the structure and purposes of the IAD, besides being purely speculative. The Colorado Supreme Court has noted:

> There is no requirement in the Interstate Agreement on Detainers that a prisoner demonstrate that prejudice resulted from a violation of its provisions. It does not appear that such a requirement would further the purposes of the Agreement as spelled out in Article I, and we decline to adopt such a construction of the Agreement.

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ultimate destination or *permanent* correctional residence. Perhaps it was his penultimate destination, but would that count to bring him under the protections of the IAD?

Hughes v. Dist. Ct., 197 Colo. 396, 402, 593 P.2d 702 (1979). It must be noted that the same "policy" reasons given by the petitioner in *Bozeman* (and soundly rejected by this Court) – *i.e.*, no rehabilitation was interrupted, no prejudice to the prisoner has been shown, the interpretation ignoring the language of the statute is really in favor of the broader purposes of the IAD – have all been reincarnated in the present case as arguments about why the IAD should not apply in the case of a prisoner serving a sentence but not yet moved to a prison. However, the statute makes no exception for an arrival of a prisoner from a jail in another jurisdiction rather than from a prison.

> [T]he Agreement makes no distinction among different kinds of IV(c) "arrivals," say, by exempting those that are followed by return within a short, specified period of time, or those that are simply for the purpose of arraignment. Given the Agreement's language and the important consequences of starting the running of the 120-day time limit, we see no basis for such a distinction. Hence, we must assume that *every* prisoner arrival in the receiving State, whether followed by a very brief stay or a very long stay in the receiving State, triggers IV(e)'s "no return" requirement.

Alabama v. Bozeman, 533 U.S. 146, 154 (2001). Clearly, *Bozeman* did not contemplate an exception for "jail arrivals," and those courts that hold to such an exception are ignoring

both the plain language of the statute and the clear pronouncement of this Court.

E. Certiorari Should Be Granted So That Uniformity, Conservation Of Judicial Resources, And Fairness May Result From The Application Of The IAD.

As an interstate compact that includes the federal government, it is desirable that the IAD be interpreted uniformly. Article I of the IAD encourages "the expeditious and orderly disposition" of detainers. (App. at 31a) It is not possible to have detainers resolved expeditiously and in an orderly manner if the treatment that they receive is different from one jurisdiction to another.

> Because both statutory law and practical reality regarding the rehabilitative functions of jails and prisons may differ from state to state, a distinction between jails and prisons may be valid in one state but not in another. Adherence to such a distinction therefore leads not to uniformity but to disparity.

Escalanti v. Superior Court, 165 Ariz. 385, 388, 799 P.2d 5 (Ariz. Ct. App. 1990).

The *Escalanti* opinion went on to state that

> the fact that both of the states involved here have laws which negate any distinction between jails and prisons suggests not only that no such distinction can be drawn in this case, but that such a distinction should not be

> drawn in any case. An interstate agreement cannot be uniformly applied when its application rests on an individual state's law or practice and that state has taken a different course than some of her sister states.

Escalanti v. Superior Court, 165 Ariz. 385, 389, 799 P.2d 5 (Ariz. Ct. App. 1990).

Besides creating uniformity, a strict reading of the IAD conserves judicial resources because the only inquiry that needs to be made is whether the prisoner "has been convicted, sentenced, and has begun serving that sentence in the sending jurisdiction" in order to determine if the IAD protections apply to that particular prisoner. *Felix v. United States*, 508 A.2d 101, 106 (D.C. App. 1986). "Uncertainty would be created if every time an IAD claim was raised this court was required to examine an individual prisoner's rehabilitative status within a particular state correctional system." *Id.* Moreover, the institution that the court would need to investigate is by definition in the sending state and is therefore out of the jurisdiction of the court in the receiving state that would need to do the inquiry.

Finally, it would be more fair to enforce the IAD as it is written. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that the courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). It cannot be helpful to the rehabilitation of prisoners to have the government

held to a lower standard than the prisoners themselves are held. Prisoners are held to strict compliance if they wish to invoke the benefits of Article III of the IAD. It should be no different when the government seeks to obtain a prisoner under Article IV. "Nothing can destroy a government more quickly than its failure to observe its own laws." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). Congress decided that the IAD should become law, and it is for Congress, not the Courts, to decide whether the language of the law should be changed. Until that time, the IAD should be enforced according to its plain language.

F. Under The Circumstances Of This Case, A § 2255 Motion Was The Appropriate Vehicle To Vindicate Taylor's Rights Under The IAD.

"A prisoner in custody under sentence of a court established by Act of Congress" "may move the court which imposed the sentence to vacate, set aside or correct the sentence" when the prisoner claims "that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. It is well-established that the IAD is a law of the United States. *See Alabama v.* Bozeman, 533 U.S. 146, 149 (2001); *New York v. Hill*, 528 U.S. 110, 111 (2000); *Reed v. Farley*, 512 U.S. 339, 347 (1994) ("Our precedent, however, has settled that issue: While the IAD is indeed state law, it is a law of the United States as well.") (citing *Carchman v. Nash*, 473 U.S. 716, 719 (1985)).

Although *Reed v. Farley*, 512 U.S. 339 (1994), is often cited for the proposition that collateral review under 28 U.S.C. § 2254 or 28 U.S.C. § 2255 is not available for IAD violations, the opinion itself leaves open the possibility that under the proper circumstances, collateral review would be appropriate to correct a court's refusal to enforce the IAD. *Reed* dealt with the time limitations of Article IV(c), and this Court noted that its decision might have been different "if a state court, presented with a timely request to set a trial date within the IAD's 120-day period, nonetheless refused to comply with Article IV(c)." *Reed*, 512 U.S. at 349.[6] Moreover, the issue of waiver, made explicit in *New York v. Hill*, 528 U.S. 110 (2000), was implicated in *Reed* because the opinion noted that there were "postponements made and explained in [defendant's] presence in open court," and "the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement." *Reed*, 512 U.S. at 342.[7]

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[6]The dissent asserted that the "unmistakable clarity" of the IAD makes a violation of its terms by a member state a serious enough matter to be considered under collateral review. *Reed v. Farley*, 512 U.S. 339, 367-368 (1994) (Blackmun, J., dissenting).

[7]In fact, Reed requested a delay himself because he needed more time to prepare. *Reed*, 512 U.S. at 353. At the first pretrial conference, at which the trial date was set, Reed "indicate[d] a preference for trial at a time when he would be out of jail on bond" and noted the dates on which he expected to be released from federal custody; these dates were after the 120 day period would have expired. *Id.* at 342-343.

There is a significant distinction between a petitioner such as Reed who obscured his speedy trial claim until after the time limit had passed and someone such as Taylor who properly raised the shuttling issue before trial and raised it throughout his direct appeal. Without the right to raise the issue under 28 U.S.C. § 2255, lower courts, which are already loathe to enforce the plain language of the IAD, will freely ignore the provisions of the IAD, knowing that the ability of this Court to grant certiorari review in only a limited number of cases will make it unlikely that they will be reversed even when they flout the mandates of *Bozeman*.

> The IAD's purpose – providing a nationally uniform means of transferring prisoners between jurisdictions – can be effectuated only by nationally uniform interpretation. Therefore, the argument that the compact would be undermined if a State's courts resisted steadfast enforcement, with total insulation from § 2254 review, is not without force.

Reed, 512 U.S. 339, 348-349 (1994) (citations omitted). The United States is a State within the meaning of the IAD, and the undermining is no less a cause for concern when circuit courts of appeal are insulated from § 2255 review when they refuse to enforce the IAD.

The situation in *Davis v. United States*, 417 U.S. 333 (1974), is not all that different from the present situation. Davis had been convicted, had appealed, had lost on appeal, and had been denied certiorari. *Davis*, 417 U.S. at 336-340. A later case held that orders issued under the same regula-

tions that Davis had been convicted of not following were illegal. *Id.* at 340. Davis applied for § 2255 relief, but on appeal the Ninth Circuit had affirmed without addressing the merits "on the ground that '[t]he decision on direct appeal is the law of the case.'" *Id.* at 341. This Court allowed Davis to seek collateral review because if his contention regarding the new case was true, "then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-347.

Similarly, Taylor raised the issue of the IAD violation and went through the denial of certiorari with his appeal. When this Court issued its opinion in *Alabama v. Bozeman*, 533 U.S. 146 (2001), Taylor raised its ruling that the IAD must be strictly interpreted on a motion under § 2255, only to be shot down by the claim that the law of the case had been established on the direct appeal. Yet, if Taylor had been accorded his rights under the IAD, there would have been no trial since the indictment would have been dismissed. Instead, he is serving a life sentence. Surely this is just as much an exceptional circumstance as was present in *Davis*, or more so. In *Davis* there was a change in the law; here, the law remained the same and *Bozeman* merely clarified that the law meant what it said.

Hill v. United States, 368 U.S. 424 (1962), is often quoted for the proposition that "'collateral relief is not available when all that is shown is a failure to comply with the formal

requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Davis*, 417 U.S. at 346. In *Hill*, the trial court had failed to ask the defendant whether he had anything to say before imposing sentencing. *Hill*, 368 U.S. at 425. There had not been any objection raised nor had there been an appeal, but the defendant did file a motion under § 2255 five years later in which he contested the validity of his sentence. *Id.* This Court held that the failure to give the opportunity for a statement was "not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Id.* at 428.

Rather than simply considering the IAD to be a collection of hypertechnical rules, the violation of which does not amount to a fundamental defect, it would be more appropriate to analyze the effect of the violation.[8] In *Hill*, there was no demonstrable indication that the outcome would have been different if Hill had been given an opportunity to speak before being sentenced. In *Davis*, the difference was whether Davis would be free or sitting in prison. Similarly in the present case, if the statute had been followed, there would have been a vastly different result: the indictment

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[8]The dissent in *Reed* noted that "[a]t the very least, the drastic remedy of dismissal saves the IAD from falling below the *Hill* fundamentality line. *Reed v. Farley*, 512 U.S. at 369 (Blackmun, J., dissenting). It should also be noted that, although it may be technical, the IAD is a statute and not just a rule of criminal procedure.

would have been dismissed.[9] Surely, the rudimentary demands of fair procedure include ***merely doing what the procedures in the statute say must be done***. It is a fundamental defect if the courts fail to enforce the laws – or worse, enforce them selectively. Relief for clear violations of the IAD should be available under 18 U.S.C. § 2255.

G. Unless this Court Grants the Petition For Writ Of Certiorari, Lower Courts Will Feel Free To Flout The Clear Directives Of This Court Regarding the IAD.

Taylor's clear statutory rights under the IAD were violated when the trial court refused to dismiss the indictment following his shuttling. Those rights were violated again when his convictions were affirmed on appeal. Despite this Court's opinion in *Bozeman*, the lower courts claim to have found a new unwritten, implicit exception that permits them to thumb their noses at the IAD and at its absolute language that "militates against an implicit exception." *Bozeman*, 533 U.S. at 153. Unless this petition for writ of certiorari is granted, courts will continue to labor under the misapprehension that it is permissible to shuttle an inmate serving a term of imprisonment as long as he is being held in a place called a jail. They will continue to avoid enforcing the IAD simply be-

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[9]Because the federal government was the receiving State, the dismissal could have been without prejudice. 18 U.S.C. App. 2, § 9. However, even if that had occurred, the fact that the jury deadlocked on whether a firearm was used in the robbery means that the outcome of a second trial was not a foregone conclusion.

cause they do not like its self-executing dismissal for violations.

This Court should grant certiorari to make it clear that it meant what it said in *Bozeman*: "every prisoner arrival in the receiving State . . . triggers IV(e)'s 'no return' requirement." *Bozeman*, 533 U.S. at 154. Certiorari should also be granted because of the mandate of the IAD itself:

> All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

18 U.S.C. App. 2, § 5. (App. at 42a) This Court can only enforce the IAD by granting certiorari and by issuing another clear directive regarding the strict interpretation of the IAD as it did in *Bozeman*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A – ORDER DENYING REHEARING, FILED APRIL 22, 2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-5311

Alvin Glenn Taylor, Petitioner-Appellant	:	
v.	:	ORDER
United States of America,	:	
Respondent-Appellee.	:	

BEFORE: SILER, DAUGHTREY, and COLE, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

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Leonard Green, Clerk

APPENDIX B – OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 5, 2003

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-5311

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALVIN GLENN TAYLOR,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee,

Before: SILER, DAUGHTREY, and COLE, Circuit Judges.

This is an appeal from a district court judgment denying a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1997, Alvin Glenn Taylor was tried to a jury and convicted of robbery affecting interstate commerce and of being a felon in possession of a firearm. A panel of this court affirmed the conviction and Taylor's life sentence. *United States v. Taylor,* 173 F.3d 538 (6th Cir. 1999). Taylor subsequently filed a motion to vacate sentence with an amendment, in which he challenged the constitutionality of his conviction on the grounds of ineffective assistance of counsel and a violation of the Interstate Agreement on Detainers (IAD). The district court denied Taylor's motion and granted a certificate of appealability on the IAD issue.

The following issue was certified by the district court for appeal: Did the district court err in rejecting Taylor's claim that he was entitled to the relief requested on the holding of *Alabama v. Bozeman,* 533 U.S. 146 (2001)? This court reviews de novo an order denying a § 2255 motion, but the district court's finding of fact are reviewed only for clear error. *Riggs v. United States,* 209 F.3d 828, 831 (6th Cir. 2000). A de novo review of the record and law, in the context of the lone issue before this court, supports the judgment on appeal.

On October 9, 1995, Taylor robbed a gas station in or around Memphis, Tennessee, while on parole for a prior Tennessee felony. Taylor was held in the Shelby County [Tennessee] Jail following his arrest by federal authorities for the gas station robbery. The Jail has been characterized as a pre-trial detainee holding facility. The State of Tennessee revoked Taylor's parole on January 12, 1996, and returned him to the Shelby County Jail pending final, permanent transfer into the state correctional system. A federal grand jury indicted Taylor for the gas station robbery on February

27, 1996, and federal authorities lodged a detainer against Taylor the next day. Taylor was brought to federal court for his initial appearance before a magistrate judge on March 20, 1996, and he was immediately returned to the Shelby County Jail. Taylor was thereafter hailed into federal court from the Jail for a detention hearing four times. He asked for and received a continuance each time. Taylor finally entered a "not guilty" plea on April 4, 1996 and he was returned to the Jail. Tennessee authorities transferred Taylor to a permanent correctional facility on April 18, 1996, to begin serving out his parole violator sentence and Taylor was transferred back to federal custody on June 20, 1996, after a second detainer and a writ of habeas corpus ad prosequendum. *Taylor,* 173 F.3d at 540.

Taylor thereafter moved to dismiss his indictment for a violation of the IAD. Taylor maintained that, as his "term of imprisonment" began on January 12, 1996, the subsequent transfers between the Jail and the federal courthouse violated "anti-shuttling" provisions of the IAD. The district court rejected this claim as did the Sixth Circuit. The Sixth Circuit opinion clearly stated that Taylor's pre-trial detention in the Jail did not constitute a "term of imprisonment" within the meaning of the IAD so that the "anti-shuttling" provisions of the IAD were not triggered. *Id.* at 541 (citing cases). In addition, the panel opined that the temporary "same-day transfers" experienced by Taylor did not violate the IAD. *Id* at 541-42.

Following the Sixth Circuit's decision, the Supreme Court decided *Alabama v. Bozeman,* 533 U.S. 146 (2001). In *Bozeman,* the Court held that the anti-shuttling directive of

the IAD is absolute, and that no exceptions shall be made for "technical" or de minimis violations of the provision. The Court thus concluded in *Bozeman* that, under the IAD, a prisoner's return to the sending jurisdiction before disposition of the charges against him in the receiving jurisdiction must result in dismissal of those charges. *Id.* at 153. The *Bozeman* decision, however, did not touch upon in any way the Sixth Circuit's interpretation of "term of imprisonment" in this context.

Taylor filed his motion to vacate sentence after *Bozeman* in which he challenged his conviction, in part on *Bozeman's* rejection of the Sixth Circuit's "de minimis" test. The district court initially concluded that there was nothing in Taylor's action to excuse him from the general rule that § 2255 relief cannot be premised upon an IAD violation. The district court held that, even if Taylor's IAD / *Bozeman* claim were cognizable in a motion to vacate sentence, the Sixth Circuit's prior refusal to characterize Taylor's Shelby County Jail time as an IAD "term of imprisonment" foreclosed to him that avenue for relief. Taylor was granted permission to appeal this aspect of the district court's decision.

The district court's latter conclusion, concerning the substance of the "term of imprisonment" holding, is supported in law. In general, findings made at one point in litigation become the law of the case for subsequent stages of that same litigation. *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir. 1994). The law of the case doctrine holds that once

an appellate court has ruled on a particular issue, absent exceptional circumstances, the ruling is final and must be followed by the district court on remand. *Miles v. Kohli & Kaliher Assocs., Ltd.*, 917 F.2d 235, 241 (6th. Cir. 1990). Thus, the district court properly held that it was not free to revisit the Sixth Circuit's prior refusal to invoke the IAD in response to Taylor's temporary, pre-trial residence at the Shelby County Jail.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

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Clerk

APPENDIX C – OPINION/ORDER OF THE DISTRICT COURT, DATED JANUARY 14, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Civ. No. 00-3062-To/V

Crim. No. 96-20037

ALVIN GLENN TAYLOR,

Defendant,

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255
ORDER GRANTING LIMITED CERTIFICATE
OF APPEALABILITY AND ORDER CERTIFYING
APPEAL WOULD BE TAKEN IN GOOD FAITH

Defendant Alvin Glenn Taylor, Federal Bureau of Prisons (BOP) registration number 15545-076, an inmate at the United States Penitentiary in Atlanta, Georgia, filed a motion pursuant to 28 U.S.C. § 2255, along with a supporting memorandum, on November 7, 2000. Thereafter, on August 7, 2001, defendant filed an amended motion and supporting memorandum purporting to raise an additional claim.

On September 14, 2001, the Honorable Bernice B. Donald entered an order dismissing all but one of defendant's claims. Judge Donald ordered the Government to respond to the defendant's claim that state and federal authorities failed to comply with the Interstate Agreement on Detainers (IAD), 18 U.S.C. app. 2. The Government filed its response on October 5, 2001, and Taylor subsequently filed a document styled, "Traverse to Government's Response to Motion under 28 U.S.C. § 2255."

The facts underlying this claim are set forth in the opinion of the United States Court of Appeals on direct appeal:

> At the time Taylor was arrested by Memphis police officers for the Texaco gas station robbery at issue in this case, he was on parole in connection with a prior Tennessee conviction. After his arrest, he was housed in the Shelby County Jail, "a holding facility for pretrial detainees." His parole was revoked following a hearing on January 12, 1996, and he remained in the Shelby County Jail awaiting transfer to a state correctional facility. He was indicted by the federal grand jury for the Texaco robbery on February 27, 1996, and the next day federal authorities lodged a detainer against him.
>
> On March 20, 1996, pursuant to a writ of habeas corpus ad prosequendum, a United States Marshal transported Taylor from the Shelby County Jail to federal court in Memphis for his initial appearance before a magistrate, and returned him immediately thereafter

> to the county jail. Between that date and April 4, 1996, when his arraignment and detention hearing were finally held, Taylor was brought to federal court four times for his detention hearing; each time Taylor requested and was granted a continuance. On April 4, 1996, Taylor pled "not guilty;" the court set a trial date and entered an order of detention pending trial; and Taylor was returned to the Shelby County Jail.
>
> On April 18, 1996, Tennessee authorities transferred Taylor to the Mark Luttrell Reception Center, a Tennessee Department of Corrections [sic] ("T.D.O.C.") facility, to serve his parole violation sentence. U.S. Marshals then lodged a new detainer with the T.D.O.C. and on June 20, 1996, pursuant to a new writ of habeas corpus ad prosequendum, Taylor was taken before the federal district court for another hearing. After that court appearance, Taylor remained in federal custody.

United States v. Taylor, 173 F.3d 538, 540 (6th Cir.), *cert. denied,* 528 U.S. 987 (1999).

Taylor contends that the transfers back and forth between the federal courthouse and the Shelby County Jail violated the "anti-shuttling" provisions of the IAD. As the Sixth Circuit explained:

> That provision requires that when an individual who has "entered upon a term of imprisonment" in one jurisdiction (the "sending

> state"), is removed to another jurisdiction (the "receiving state") pursuant to a detainer, he must be tried in the receiving state before being returned to the sending state; if he is not, the indictment in the receiving state "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Id. see 18 U.S.C. app. 2, § 2, art. IV(e).[1]

Taylor raised this issue on direct appeal, where the Sixth Circuit rejected it on two grounds. First, the Sixth Circuit held that the IAD was not implicated because Taylor had not begun serving his "term of imprisonment" in a "correctional institution" while he was being held at the Jail. *Taylor,* 173 F.3d at 540-541. Second, the Sixth Circuit held that, even if the IAD was implicated, the series of "quick, temporary transfers" at issue here do not violate the IAD. *Id.* at 541-42.

Following the Supreme Court's decision in *Alabama v. Bozeman,* 121 S. Ct. 2079 (2001), Taylor amended his § 2255 motion to raise the IAD claim. In *Bozeman,* the Supreme Court found a violation of the "anti-shuttling" provision of the IAD when a federal prisoner was transferred to state custody for a single day in order to be arraigned on state charges and have local counsel appointed. In so hold-

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[1] Section 9(1) of the IAD provides that, where the United States is the "receiving state," any order of a court dismissing any indictment may be with or without prejudice."

ing, the Supreme Court rejected the argument that there is a *de minimis* exception to the "anti-shuttling" provision, explaining that "the language of the agreement militates against an implicit exception, for it is absolute." *Id.* at 2084-85. Thus, the Supreme Court's decision in *Bozeman* appears to be inconsistent with the Sixth Circuit's second basis for rejecting Taylor's IAD claim on direct appeal.

As a preliminary matter, the Government argues that an IAD claim may not be raised in a § 2255 motion. In *Reed v. Farley,* 512 U.S. 39 (1994), upon which the Government relies, The Supreme Court held that a defendant may not raise an IAD claim in a petition pursuant to 28 U.S.C. § 2254 when he did not raise a timely objection prior to trial.[2] However, this case is distinguishable from *Reed* in that Taylor *did* raise a timely pretrial objection, and also raised the issue on direct appeal. Accordingly, Taylor has not procedurally defaulted this claim. *Cf. Mars v. United States,* 615 F.2d 704, 707 (6th Cir. 1980) (appellant waived claim for relief under the IAD through failure to raise it prior to or during trial.)

In *United States v. Davis,* 417 U.S. 333, 342-46 (1974), the Supreme Court held that, under appropriate circumstances, a defendant may raise, in a § 2255 motion, an issue that had been decided against him on direct appeal where there has been an intervening change in the law. Nonethe-

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[2] Although *Reed* involved a § 2254 petition, the Court stated that, when evaluating federal statutory claims, the standards of § 2254 petitions and § 2255 motions are identical. *Id.* at 353-55.

less, the Supreme Court also suggested that not every change in the law would warrant § 2255 relief:

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill v. United States,* 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "it . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.,* at 428.

Id. at 346. *Davis* involved an intervening change in the law pursuant to which, if his arguments were accepted, "then Davis' conviction and punishment are for an act that the law does not make criminal." *Id.* Accordingly, the Supreme Court concluded that "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-47.

The factual situation in *Davis* is far more compelling than that at issue here. Taylor has not attempted to claim that he was prejudiced in any way by the alleged violations of the

IAD. Moreover, given the purely technical nature of the "anti-shuttling" provision of the IAD, and the *de minimis* nature of any violation that may have occurred in this instance, Taylor plainly cannot demonstrate the existence of a "a fundamental defect which inherently results in a complete miscarriage of justice." *See Reed,* 512 U.S. at 356-58 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment) (arguing that the defendant's claim would not have been cognizable in a § 2255 motion even if he had timely objected because he could not satisfy the *Hill* test; noting that "[i]f ever there was a technical rule, the IAD's 120-day limit is one. I think we produce confusion by declining to state the obvious: that violation of that technicality, intentional or unintentional, neither produces nor is analogous to (1) lack of jurisdiction of the convicting court, (2) constitutional violation, or (3) miscarriage of justice or denial of rudimentary procedures. It is not basis for federal habeas relief.")

Notwithstanding the general rule for review of federal statutory claims in § 2255 motions, in *Mars* the Sixth Circuit, *in dicta,* expressly left open the possibility that a defendant may be entitled to relief on the basis of an IAD claim by stating that "[o]ur decision today does not foreclose § 2255 relief for governmental violations of the IAD in instances where petitioner can show . . . that his IAD rights properly asserted before the trial court were not properly vindicated." 615 F.2d at 707 n.9. Nonetheless, this *dicta* does not alter the Court's conclusion that Taylor's claim is not recognizable in a § 2255 motion, as there is some indication that the Sixth Circuit has retreated from the position expressed in *Mars.*

In *Metheny v. Hamby,* 835 F.2d 672, 675 (6th Cir. 1987), the Sixth Circuit held that, "in the absence of exceptional circumstances, a claimed violation of Article IV(e) of the IAD is not a fundamental defect which is cognizable under 28 U.S.C. § 2254." Although the Sixth Circuit relied up its decision in *Mars* for this proposition, the Court of Appeals did not acknowledge the *Mars* dicta. Moreover, notwithstanding that *dicta,* this Court has been unable to locate a single Sixth Circuit decision granting relief to a defendant on an IAD claim in a § 2255 proceeding, let alone a § 2255 proceeding in which the defendant is unable to demonstrate prejudice.

For all the foregoing reasons, the Court holds that Taylor's IAD claim is not cognizable on a § 2255 motion.

Even if that were not the case, Taylor would still not be entitled to relief on this claim. Nothing in the Supreme Court's decision in *Bozeman* affects the Sixth Circuit's first basis for rejecting the claim on direct appeal, that Taylor had not begun serving his "term of imprisonment" in a "correctional institution" while he was being held at the Jail. *See supra* page 3. The Sixth Circuit's opinion does not suggest that it would have granted relief to Taylor on his IAD claim had the decision in *Bozeman* been available to it.

Moreover, "[u]nder the law of the case doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court in the same case." *Bowling v. Pfizer, Inc.,* 132 F.3d 1147, 1150 (6th Cir. 1998) (quoting *Consolidation Coal Co. v. McMahon,* 77 F.3d 898, 905 (6th Cir. 1996)). Accordingly, this Court lacks the ability to revisit the first ground for relief relied on by the

Sixth Circuit. For that reason alone, Taylor's motion must be denied.

For the foregoing reasons, defendant's § 2255 motion is DENIED.[3]

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion.[4] Section 2255 now incorporates the old habeas procedure of issuing or denying a certificate of probable cause, now renamed a certificate of appealability. No § 2255 movant may appeal without this certificate.

In *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir. 1997), the Sixth Circuit held that amended § 2253 codifies the standard for issuing a certificate of probable cause found in prior § 2253, which was essentially a codification of *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

> [P]robable cause requires something more than the absence of frivolity . . . and the standard for issuance of a certificate of probable cause is a higher one than the 'good faith' requirement of § 1915. . . . [A] certificate of

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[3] Because of the resolution of the issues discussed in the text, the Court expressly does not reach the issue of whether the Supreme Court's decision in *Bozeman* is retroactively applicable to cases on collateral review.

[4] Because this is a final order, the discussion of appeal issues also applies to the claims dismissed in Judge Donald's previous order.

> probable cause requires petitioner to make a substantial showing of the denial of [a] federal right. [A] question of some substance, or a substantial showing of the denial of [a] federal right, obviously [does not require] the petitioner [to] show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot, 463 U.S. at 893 (internal quotations and citations omitted).

In this case, the Court will grant a certificate of appealability, limited to defendant's IAD claim. Doing so will afford the Sixth Circuit an opportunity to apply the *dicta* in *Mars* in the event it determines that § 2255 relief is available for claims of this nature. Moreover, a certificate of appealability will also enable the Sixth Circuit to reconsider its decision on the IAD issue in light of the Supreme Court's decision in *Bozeman.*

The Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. § 1915(a)(3), does not apply to appeals of orders denying § 2255 motions. *Kincade v. Sparkman,* 117 F.3d 949, 951 (6th Cir. 1997). Rather, to seek leave to appeal *in forma pauperis* in a § 2255 case, and thereby avoid the $105 filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner generally must seek permission from the district court under

Fed. R. App. P. 24. Kincade, 117 F.3d at 952. However, a party who was permitted to proceed *in forma pauperis* in the district court may proceed *in forma pauperis* on appeal without further authorization unless the district court certifies that the appeal is not taken in good faith, or otherwise denies pauper status. Fed. R. App. P. 24(a)(3).

For the same reasons the Court grants a limited certificate of appealability, it is CERTIFIED, pursuant to Fed. R. App. P. 24(a)(3), that any appeal in this matter by the defendant would be taken in good faith. As the defendant was allowed to proceed *in forma pauperis* in this Court, he may also proceed *in forma pauperis* on appeal.

IT IS SO ORDERED THIS 14th day of January, 2002.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

APPENDIX D- OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 1, 1999

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 1999 FED App. 0123P
(6th Cir.) File Name: 99a0123p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v. No. 97-5795

ALVIN GLENN TAYLOR,
Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Tennessee at Memphis.
No. 96-20037 – Jerome Turner, District Judge.

Submitted: November 6, 1998

Decided and Filed: April 1, 1999

Before: JONES, RYAN, and BATCHELDER,
Circuit Judges.

COUNSEL ON BRIEF:

William C. Anderson, Jr., Memphis, Tennessee, for Appellant. Tony R. Arvin, OFFICE OF THE U.S. ATTORNEY, Memphis, Tennessee, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. The Defendant-Appellant Alvin Taylor robbed a Texaco gas station and, after a federal jury trial, was convicted of robbery affecting interstate commerce, 18 U.S.C. § 1951, and being a felon in possession of a firearm, 18 U.S.C. §§ 922(g), 924(e). Taylor raises various issues concerning his trial and sentence, most of which center around the single question of whether he used a firearm during the robbery. He also argues that the indictment should have been dismissed because the government violated the Interstate Agreement on Detainers, 18 U.S.C. app. 2. For the reasons stated below, we AFFIRM his conviction and sentence.

BACKGROUND

On the morning of October 9, 1995, at approximately 9:00 a.m., Berry Weatherford was outside the manager's office at the Texaco gas station where he worked. He was in the process of transferring a bag of money from the station's convenience store safe to the manager's office, which was accessible only from outside the convenience store. As he reached the office door, it suddenly swung open and the defendant, Alvin Taylor, jumped out, thrust a gun into Weatherford's midsection, and demanded the money. Weatherford dropped the bag of money, Taylor picked it up and ran. Weatherford gave the police a description of both the car in which Taylor fled the scene and the gun that Taylor had brandished in the robbery. After a high-speed chase, Taylor's car collided with a Pepsi truck and Taylor attempted to flee on foot, after pointing a gun at a pursuing officer and

tossing it away when, apparently, it failed to fire. Eyewitnesses gave descriptions of the gun different from the description given by Weatherford as to size and color, but they agreed with Weatherford that the weapon was an automatic pistol. Inside Taylor's car, the police found the bag of money that had been taken from Weatherford. They also found some black tape matching the tape that had been used on the door of the Texaco manager's office. They found the gun – a .25 caliber semiautomatic pistol – lying in the street where Taylor had thrown it after pointing it at the officer chasing him. Weatherford identified Taylor as the man who had robbed him.

Taylor was indicted by a federal grand jury for robbery affecting commerce in violation of 18 U.S.C. § 1951; using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c); and being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g), 924(e). His motion to dismiss the Indictment for violation of the Interstate Agreement on Detainers ("IAD"), 18 U.S.C. app. 2, was denied by the district court, and after a jury trial. Taylor was convicted on the robbery and felon in possession counts. The jury was unable to reach a verdict on the § 924(c); count, and the district court granted a mistrial on that count, which was then dismissed upon the Government's motion. The court sentenced Taylor to life imprisonment for the robbery count pursuant to the federal "three strikes" statute, 18 U.S.C. § 3559(c), and a consecutive 424 months for being a felon in possession of a firearm. Taylor filed this timely appeal.

INTERSTATE AGREEMENT ON DETAINERS

The Interstate Agreement on Detainers ("IAD") includes what has come to be called the "anti-shuttling" provision. That provision requires that when an individual who has "entered upon a term of imprisonment" in one jurisdiction (the "sending state"), is removed to another jurisdiction (the "receiving state") pursuant to a detainer, he must be tried in the receiving state before being returned to the sending state; if he is not, the indictment in the receiving state "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." *See* 18 U.S.C. app. 2, § 2, art. III(d).[1]

At the time Taylor was arrested by Memphis police officers for the Texaco gas station robbery at issue in this case, he was on parole in connection with a prior Tennessee conviction. After his arrest, he was housed in the Shelby County Jail, "a holding facility for pretrial detainees." His parole was revoked following a hearing on January 12, 1996, and he remained in the Shelby County Jail awaiting transfer to a state correctional facility. He was indicted by the federal

---

[1] Section 9 of the IAD, however, provides that when the United States is the "receiving state," dismissal with prejudice is not necessarily required; rather, the federal court needs to consider, "among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice." 18 U.S.C. app. 2, § 9(1).

grand jury for the Texaco robbery on February 27, 1996, and the next day federal authorities lodged a detainer against him.

On March 20, 1996, pursuant to a writ of habeas corpus and prosequendum, a United States Marshal transported Taylor from the Shelby County Jail to federal court in Memphis for his initial appearance before a magistrate, and returned him immediately thereafter to the county jail. Between that date and April 4, 1996, when his arraignment and detention hearing were finally held, Taylor was brought to federal court four times for his detention hearing; each time Taylor requested and was granted a continuance. On April 4, 1996, Taylor pled "not guilty;" the court set a trial date and entered an order of detention pending trial; and Taylor was returned to the Shelby County Jail.

On April 18, 1996, Tennessee authorities transferred Taylor to the Mark Luttrell Reception Center, a Tennessee Department of Corrections ("T.D.O.C.) facility, to serve his parole violation sentence. U.S. Marshals then lodged a new detainer with the T.D.O.C. and on June 20, 1996, pursuant to a new writ of habeas corpus ad prosequendum, Taylor was taken before the federal district court for another hearing. After that court appearance, Taylor remained in federal custody.

Taylor contends that his "term of imprisonment" for the parole violation began when he was returned to the Shelby County Jail after he was sentenced in state court on January 12, 1996; therefore, he says, the subsequent transfers back

and forth between the federal courthouse and the Shelby County Jail violated the IAD. The Government counters that his "term of imprisonment" did not begin until he was transferred from the Shelby County Jail to the T.D.O.C. facility on April 18, 1996, and the IAD was not implicated by the shuttling back and forth that occurred before that date.

This circuit has not explained whether "term of imprisonment" includes the time that a defendant may spend in a county jail before being placed in a state penitentiary. In *United States v. Glasgow*, 790 F.2d 446 (6th Cir. 1985) (per curiam), we held that the IAD's time limits never became applicable to a defendant being held in a county jail who was sentenced to a prison term in the state prison and transferred to federal custody the next day because the "defendant never actually began serving his state term of imprisonment in a state correctional facility." *Id.* at 449. In *United States v. Roberts*, 548 F.2d 665 (6th Cir. 1977), we explicitly held that a *pretrial detainee* awaiting his trial has not begun his "term of imprisonment," *see id.* at 669-71. The First Circuit has quoted a portion of the reasoning of *Roberts* and extended its holding to an instance where the defendant had been tried, convicted and sentenced, but had yet to be moved from the county jail to the state correctional facility, see *Crooker v. United States*, 814 F.2d 75, 77-78 (1st Cir. 1987).

There is a sharp disagreement among courts as to whether the IAD is triggered when a detainer is lodged against a convicted and sentenced prisoner who is being held in temporary custody pending a transfer to his permanent incarceration. The reasoning behind the two positions on this question is

cogently summarized by the Supreme Court of North Dakota in *Runck v. State,* 497 N.W.2d 74 (N.D. 1993):

> Courts which rule that a detainer lodged against a prisoner in temporary custody is of no effect and does not bring the IAD into play reason that, because the basic purpose of the IAD is to prevent interference with institutional care and rehabilitation, which is not normally available at a facility or jail designed for temporary custody of prisoners, "one cannot interrupt that which has not yet started." Courts which decline to distinguish between temporary and correctional custody in establishing the point at which the protections of the IAD become applicable reason that a rule encompassing all post-sentence confinement would be easier to apply, would avoid the possibility of encouraging the sending state to extend the period of confinement in a temporary facility because of outstanding detainers, and would alleviate judicial examination of an individual prisoner's rehabilitative status while in temporary confinement whenever an IAD claim is raised.

Id. at 81 (citations omitted). After reviewing the relevant cases from this circuit and those of our sister circuits and the reasoning behind the IAD, we conclude that "correctional facility" is correctly understood as meaning the state facility to which the Defendant is ultimately assigned, not the local facility in which he sits awaiting transfer to that facility. As

Runck notes, "the basic purpose of the IAD is to prevent interference with institutional care and rehabilitation, which is not normally available at a facility or jail designed for temporary custody of prisoners," id. While there may be an occasional case in which a defendant awaiting transfer is involved in rehabilitative programs offered at the local facility, such rehabilitation efforts themselves ultimately would be disrupted by that defendant's transfer to his permanent correctional residence.

Even if we concluded that "correctional facility" includes the county jail, we would find no violation of the IAD in this case. During a 16 day period, Taylor was shuttled back and forth between the state facility and federal court a total of six times, four of which were attributable to the his own requests for continuances. Each time, Taylor was returned to the county jail the same day. Numerous circuit courts have held that such quick, temporary transfers do not violate the IAD. *See Taylor v. United States,* 504 U.S. 991 (1992) (White, J., dissenting from denial of certiorari) (listing cases from First, Second, Fifth, (Unit B 1981), Seventh, and Ninth Circuits). The position of these cases is summarized in *United States v. Daniels,* 3 F.3d 25, 27-28 (1st Cir. 1993):

> Daniel's argument for dismissal is based on a literal reading of Article IV(e). Strictly speaking, the argument is not without merit. In this circuit, however, we have firmly held that "common sense rejects that literal application." Instead, we have held – as have several other circuits – that a brief interruption in state prison confinement for purposes of ar-

> raignment, where the prisoner is returned to state custody the same day, does not violate the IAD.
>
> The rationale behind our interpretation of the IAD is that a brief interruption in state custody poses no threat to the prisoner's rehabilitation efforts, the main purpose of the Act. Indeed, as we have noted, such interruptions may be advantageous to a defendant. *See, e.g.*, [*United States v.*] *Taylor*, 947 F.2d [1002,] 1003 (1st Cir. 1992)] (securing speedy arraignment).
>
> (footnote and citations omitted).

This Circuit has not directly spoken on this issue.[2] We conclude that we agree with the "common sense" approach

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[2] In *United States v. Eaddy*, 595 F.2d 341 (6th Cir. 1979) (*"Eaddy II"*), this Court stated "Additionally, [defendant] was shuttled back and forth between federal and State custody on two occasions after the detainer had been lodged against him, but prior to his trial on the federal bank robbery charge. Under the holding of *Mauro*, the Government's handling of Eaddy violated [Article IV(e)]." *Id.* at 343. However, Eaddy as in Michigan State Prison, and the "two occasions" did not involve one-day trips for an initial appearance or arraignment. Rather, on the first occasion, Eaddy appeared before the district court on September 22, 1975, regarding a court-ordered line-up requested by Eaddy. The motion was denied, but Eaddy was retained in federal custody pending a rescheduled trial date of September 30. When the September 30 trial date was pushed back due to court congestion, he was returned to the state prison. The second occasion occurred when Eaddy was again brought to Detroit for his federal trial, this time for approximately

applied by a majority of the circuits rather than the strictly literal reading given the statute by a minority of the circuits, *see United States v. Thompson,* 562 F.2d 232, 234-35 (3d Cir. 1977) (en banc) and *United States v. Schrum,* 504 F.Supp. 23, 28 (D. Kan. 1980), *aff'd on the basis of the dist. ct. op.,* 638 F.2d 214 (10th Cir. 1981). We therefore hold that Taylor's same-day transfers to and from federal court, most of which were brought about by his own requests for continuances, did not violate the IAD.

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three days, and then was returned to the state prison after the trial was again postponed, *see United States v. Eaddy,* 563 F.2d 252, 253-54 (6th Cir. 1977) (*"Eaddy I"*). Thus, *Eaddy II* does not provide precedential guidance on this issue.

CONCLUSION

We have considered the other claims of error made by the defendant and conclude that they do not merit discussion. Accordingly, we AFFIRM Taylor's conviction and sentence.

APPENDIX E – INTERSTATE AGREEMENT ON DETAINERS ACT, 18 U.S.C. APPENDIX 2

The Interstate Agreement on Detailers Act, Title 18 of the United States Code Appendix 2, provides as follows:

§ 1. Short title

This Act may be cited as the "Interstate Agreement on Detainers Act".

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

The contracting States solemnly agree that:

ARTICLE I

The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating

from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(a) 'State' shall mean a State of the United States, the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) 'Sending State' shall mean a State; in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting

officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: Provided, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return requested.

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be re-

quired in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And provide further, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who had lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefore.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the execution authority of the sending State has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or

other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall gov-

ern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefore.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by Senate officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters.

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney

General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia. All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions.

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective Date

This Act shall take effect on the nineteenth day after the date of its enactment.

§ 9. Special Provisions when United States is a Receiving State

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State-

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the c court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing

Supreme Court, U.S.
FILED
SEP 24 2003
OFFICE OF THE CLERK

No. 03-127

In the Supreme Court of the United States

ALVIN GLENN TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
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QUESTIONS PRESENTED

1. Whether petitioner's "amended" motion under 28 U.S.C. 2255, which was filed more than one year after his conviction became final and which raised a claim that was unrelated to the claims in his original motion, is untimely.

2. Whether the lower courts erred in denying petitioner's "amended" motion under 28 U.S.C. 2255 on the ground that it raised a claim that had already been raised and rejected on direct appeal.

3. Whether, if the claim is properly presented by petitioner's "amended" motion under 28 U.S.C. 2255, the Interstate Agreement on Detainers Act applied to petitioner while he was being held in a county jail pending transfer to the State's Department of Corrections for imprisonment on a parole violation.

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In the Supreme Court of the United States

No. 03-127

ALVIN GLENN TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals denying petitioner's motion under 28 U.S.C. 2255 (Pet. App. 3a-7a) is not officially reported, but is available at 59 Fed. Appx. 58. The earlier opinion of the court of appeals denying petitioner relief on direct review (Pet. App. 19a-30a) is reported at 173 F.3d 538, cert. denied, 528 U.S. 987 (1999) (No. 99-5101).

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2003. A petition for rehearing was denied on April 22, 2003 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of committing an armed robbery affecting commerce, in violation of 18 U.S.C. 1951; and one count of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g) and 924(e). He was sentenced to life imprisonment on the Hobbs Act charge, pursuant to the "three strikes" statute, 18 U.S.C. 3559(c); and to a consecutive term of 424 months of imprisonment on the felon-in-possession charge, pursuant to the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e). On direct appeal, the court of appeals affirmed petitioner's sentence and conviction, Pet. App. 19a-30a, and this Court denied certiorari. 528 U.S. 987 (1999).

On November 7, 2000, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. On August 7, 2001, petitioner filed an "amended" motion under Section 2255, in which he added a claim that state and federal authorities failed to comply with the Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397, 18 U.S.C. App. 1 *et seq.* (IAD). The district court denied the claims raised by petitioner in his original and amended motion under Section 2255, but granted a certificate of appealability limited to the IAD issue raised by the amended motion. Pet. App. 8a-18a. The court of appeals affirmed the denial of petitioner's 2255 motion. *Id.* at 3a-7a.

1. On October 9, 1995, petitioner committed the armed robbery of a gas station in Memphis, Tennessee. Petitioner fled the gas station in a vehicle and, after the robbery was reported, the police gave chase. Petitioner

was apprehended after a physical struggle with police and after he unsuccessfully attempted to shoot a police officer. Police recovered from petitioner a loaded pistol, along with the money that he had stolen from the gas station. Pet. App. 21a; Gov't 1997 C.A. Br. 4-9.[1]

2. At the time of the robbery, petitioner was on parole in connection with a prior Tennessee conviction. After his arrest for the robbery and assault, petitioner was confined at the Shelby County Jail, a temporary holding facility for pretrial detainees. He remained in the Shelby County Jail after a state court revoked his parole on January 12, 1996, while awaiting transfer to a state correctional facility. Pet. App. 23a; Gov't 1997 C.A. Br. 18.

On February 27, 1996, a federal grand jury indicted petitioner on charges stemming from the armed robbery. The next day, federal authorities lodged a detainer against petitioner with state authorities and, on March 20, 1996, the United States Marshal delivered petitioner from the Shelby County Jail to the federal district court in Memphis, pursuant to a writ of habeas corpus ad prosequendum. After appearing before a federal magistrate in Memphis, petitioner was returned to the Shelby County Jail. Pet. App. 24a; Gov't 1997 C.A. Br. 18. Between March 20, 1996, and April 4, 1996, petitioner was transferred from the Shelby County Jail to the federal court and then back to the county jail four separate times. On April 4, 1996, petitioner pleaded

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[1] "Gov't 1997 C.A. Br." refers to the government's brief in petitioner's direct appeal to the Sixth Circuit (6th Cir. No. 97-5795); "1997 C.A. J.A." refers to the Joint Appendix that was filed in that appeal; and "2002 C.A. J.A." refers to the Joint Appendix that was filed in petitioner's appeal from the denial of his Section 2255 motion (6th Cir. No. 02-5311).

"not guilty," the federal court set a trial date and entered an order of detention pending trial, and petitioner was again returned to the Shelby County Jail. Pet. App. 24a; Gov't 1997 C.A. Br. 18-19.

On April 18, 1996, petitioner was transferred to a Tennessee Department of Corrections facility to begin serving his parole violation sentence. After petitioner had been transferred from the county jail where pretrial detainees are temporally housed to the state correctional facility, the United States Marshal lodged a new detainer with the Tennessee Department of Corrections. On June 20, 1996, petitioner appeared before the federal district court pursuant to a writ of habeas corpus ad prosequendum. After that hearing, petitioner was remanded to federal custody pending his trial. Pet. App. 24a; Gov't 1997 C.A. Br. 19.

3. On October 25, 1996, petitioner moved to dismiss the federal indictment, alleging that the government had violated Article IV(e) of the IAD by returning him to state custody after his brief appearances in federal court. 1997 C.A. J.A. 38-42. The IAD (18 U.S.C. App. 2, Art. IV(a)) applies to persons who are "serving a term of imprisonment in any party State." 18 U.S.C. App. 2. Article IV(e) of the IAD states, in pertinent part: "If trial is not had on any indictment * * * contemplated hereby prior to the prisoner's being returned to the original place of imprisonment * * * , such indictment * * * shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." 18 U.S.C. App. 2. When the United States is the "receiving State," dismissal may be "with or without prejudice." 18 U.S.C. App. 9(1). The district court denied petitioner's motion to dismiss the indictment, rejecting his IAD claim. See 1997 C.A. J.A. 20-27.

4. The court of appeals affirmed. Pet. App. 19a-30a. The court first held that the protections of the IAD, which do not apply unless an individual is serving a "term of imprisonment," did not apply to petitioner's temporary detention in the Shelby County Jail pending his transfer to a state penitentiary for permanent incarceration. *Id.* at 24a-27a. In addition, the court concluded that, even if the IAD applied when petitioner was temporarily held in the county jail, petitioner's same-day transfers from that jail to the federal court to attend pretrial proceedings did not violate the IAD's anti-shuttling provision. *Id.* at 27a-29a.

Petitioner filed a petition for a writ of certiorari (No. 99-5101), in which he presented his IAD claims to this Court. On November 8, 1999, this Court denied that petition. 528 U.S. 987.

5. On November 1, 2000, petitioner filed a Section 2255 motion. 2002 C.A. J.A. 5-10. Nine months later, on August 7, 2001, petitioner filed an "amended" Section 2255 motion, in which he "incorporate[d] the original argument submitted to the Sixth Circuit Court of Appeals" that "State and Federal authorities violated his constitutional right" by failing to comply with "Articles IV and V" of the IAD. *Id.* at 11-12. The amended motion referred to this Court's decision in *Alabama* v. *Bozeman*, 533 U.S. 146, 149 (2001). In *Bozeman*, the Court held that Article IV(e) of the IAD requires the dismissal of criminal charges when a defendant who is serving a term of imprisonment is returned to the original place of imprisonment before trial, even when, as in *Bozeman*, "the interruption of the initial imprisonment last[s] for only one day." *Id.* at 149. See 2002 C.A. J.A. 12.

6. On September 13, 2001, the district court issued an order denying in part petitioner's original Section

2255 motion and certifying that no appeal of that order could be taken in good faith. 2002 C.A. J.A. 15-31. At the same time, however, the district court ordered the government to respond to the IAD claim raised in petitioner's amended Section 2255 motion. *Id.* at 30-31. After the government filed its response, the district court denied petitioner's amended Section 2255 motion. Pet. App. 8a-18a.

The district court explained that on direct appeal the Sixth Circuit had "held that the IAD was not implicated because [petitioner] had not begun serving his 'term of imprisonment' in a 'correctional institution' while he was being held at the [Shelby County] Jail." Pet. App. 11a. Although the court recognized that, under *Davis* v. *United States*, 417 U.S. 333, 342-346 (1974), there may be circumstances in which a defendant may raise "an issue that had been decided against him on direct appeal" in light of "an intervening change in the law," the court found that the "factual situation in *Davis*" is "far more compelling than that at issue here." Pet. App. 12a-13a. In addition, although the district court declined to adopt a blanket rule that "IAD claim[s] may not be raised in a § 2255 motion" (*id.* at 12a), the court noted that it had "been unable to locate a single Sixth Circuit decision granting relief to a defendant on an IAD claim in a § 2255 proceeding, let alone a § 2255 proceeding in which the defendant is unable to demonstrate prejudice." *Id.* at 15a.[2]

The district court further held that, even if petitioner's IAD claim were cognizable in this Section 2255 proceeding, petitioner "would still not be entitled to

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[2] The district court "expressly d[id] not reach the issue of whether the Supreme Court's decision in *Bozeman* is retroactively applicable to cases on collateral review." Pet. App. 16a n.3.

relief on this claim." Pet. App. 15a. The court explained that nothing in *Bozeman* affected the court of appeals' first basis for rejecting petitioner's IAD claim on direct appeal, *i.e.*, "that [petitioner] had not begun serving his 'term of imprisonment' in a 'correctional institution' while he was being held at the Jail," *ibid.*, and that the protections of the IAD therefore did not apply to petitioner at that time. In addition, the court explained, nothing in the Sixth Circuit's decision on petitioner's direct appeal indicated that "it would have granted relief to [petitioner] on his IAD claim had the decision in *Bozeman* been available to it." *Ibid.* As a result, the district court concluded that under the law-of-the-case doctrine, it lacked authority to revisit the court of appeals' holding that the IAD did not apply to petitioner. *Id.* at 15a-16a.

The district court granted petitioner a certificate of appealability on his renewed IAD claim. Pet. App. 17a. The court explained that an appeal would permit the court of appeals to determine whether a statutory claim under the IAD is cognizable in a Section 2255 motion. *Ibid.* In addition, the court noted, it would provide the court of appeals an opportunity to reconsider its prior decision in the case. *Ibid.*

7. The court of appeals affirmed. Pet. App. 3a-7a. The court phrased the issue certified for appeal as follows: "Did the district court err in rejecting [petitioner's] claim that he was entitled to the relief requested on the holding of *Alabama v. Bozeman*, 533 U.S. 146 (2001)?" Pet. App. 4a. The court noted that its prior opinion in this case had "clearly stated that [petitioner's] pre-trial detention in the [Shelby County] Jail did not constitute a 'term of imprisonment' within the meaning of the IAD so that the 'anti-shuttling' provisions of the IAD were not triggered." *Id.* at 5a.

Furthermore, the court explained, this Court's decision in *Bozeman* "did not touch upon in any way the Sixth Circuit's interpretation of 'term of imprisonment' in this context." *Id.* at 6a. As a result, the court concluded that, under the law-of-the-case doctrine, "the district court properly held that it was not free to revisit the Sixth Circuit's prior refusal to invoke the IAD in response to [petitioner's] temporary, pre-trial residence at the Shelby County Jail." *Id.* at 7a.

ARGUMENT

1. Petitioner renews (Pet. 9-21) the argument that he made in his previous petition for certiorari in this case (No. 99-5101) that the government violated the IAD when it transferred him between the Shelby County Jail and the federal courthouse in Memphis for pretrial proceedings. That argument is less certworthy in its current procedural posture than it was when the Court denied certiorari with respect to petitioner's previous petition.

a. Petitioner's amended Section 2255 motion—in which he raised his IAD claim for the first time in this post-conviction proceeding—is untimely and therefore barred. A federal prisoner's motion for post-conviction relief under Section 2255 "is subject to a one-year time limitation that generally runs from 'the date on which the judgment of conviction becomes final.'" *Clay* v. *United States*, 123 S. Ct. 1072, 1075 (2003) (quoting 28 U.S.C. 2255, para. 6(1)). When a federal defendant files a direct appeal and pursues it to this Court, his conviction becomes final when the Court denies the petition or issues a decision on the merits. See *id.* at 1077 n.4. This Court denied petitioner's original petition for certiorari on November 8, 1999 (528 U.S. 987), and his conviction became final on that date. Petitioner thus

had one year from that date to file a Section 2255 motion. As discussed, petitioner filed a timely Section 2255 motion on November 1, 2000, but that motion did not include any IAD claim. 2002 C.A. J.A. 5-10. Petitioner's subsequent attempt in August 2001 to "amend" that Section 2255 petition, by raising a claim under the IAD that is unrelated to the four claims presented in his timely Section 2255 petition, was not timely.

In general, a motion to amend a Section 2255 petition filed after the expiration of the one-year limitation period established by Section 2255, para. 6(1), may be deemed to have been filed within that one-year limitation period only if the claim in the proposed motion "relates back" to the petitioner's original Section 2255 motion under Rule 15(c) of the Federal Rules of Civil Procedure. See *Davenport* v. *United States*, 217 F.3d 1341, 1345-1346 (11th Cir. 2000) (citing cases), cert. denied, 532 U.S. 907 (2001); see also *United States* v. *Hicks*, 283 F.3d 380, 387-388 (D.C. Cir. 2002); *United States* v. *Saenz*, 282 F.3d 354, 355-356 (5th Cir. 2002); *United States* v. *Espinoza-Saenz*, 235 F.3d 501, 504-505 (10th Cir. 2000). A claim or defense raised in an amended pleading relates back to the original pleading only when that claim or defense "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). "The fact that amended claims arise from the same trial and sentencing proceeding as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c)." *United States* v. *Pittman*, 209 F.3d 314, 318 (4th Cir. 2000); accord *Hicks*, 283 F.3d at 388; *Davenport*, 217 F.3d at 1345-1346; *Espinoza-Saenz*, 235 F.3d at 505; *United States* v. *Thomas*, 221 F.3d 430, 436 (3d Cir. 2000); *United States*

v. *Duffus*, 174 F.3d 333, 337-338 (3d Cir.), cert. denied, 528 U.S. 866 (1999); *United States* v. *Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999).

Petitioner's "amended" Section 2255 motion does not relate back to his original motion. The IAD claim raised in the amended motion is distinct from the claims raised in his original motion. Because the district court should simply have rejected petitioner's "amended" Section 2255 motion as untimely, the posture of this case is particularly unsuited for further review.

The district court did not disagree with that analysis. Rather, the district court, after explaining that petitioner's amended motion was filed after expiration of the one-year statute of limitations, believed that it was appropriate to consider the amended motion on its merits, because the added claim referred to this Court's intervening decision in *Bozeman*. 2002 C.A. J.A. 30-31. As the courts below concluded, however, *Bozeman* does not entitle petitioner to relief under the IAD, because, as the Sixth Circuit held on direct appeal, petitioner was not serving a "term of imprisonment" triggering the IAD when petitioner was being temporarily held in the county jail. See Pet. App. 6a, 15a.

In *Bozeman*, this Court held that the anti-shuttling provision in Article IV(e) of the IAD—which requires dismissal when a prisoner is returned to his "original place of imprisonment" before "trial" in the receiving State was "had"—applies when a prisoner is returned to the sending State for a period as short as a day. *Bozeman*, 533 U.S. at 148-149 (quoting Article IV(e) of the IAD). The threshold IAD issue in this case, by contrast, is whether the IAD—and the anti-shuttling provision construed in *Bozeman*—applied at all to petitioner when he was confined in the county jail waiting transfer to the state correctional facility. As discussed

above, that question turns on whether petitioner was serving a "term of imprisonment" for purposes of the IAD when he was housed at the county jail, a question not addressed by *Bozeman*.

b. Under paragraph 8 of 28 U.S.C. 2255, a second or successive motion by a federal prisoner must be certified by a court of appeals panel "as provided in section 2244" to contain either new evidence that establishes a defendant's innocence or a new rule of constitutional law that applies retroactively. Because petitioner's amended Section 2255 motion does not relate back to petitioner's timely Section 2255 motion, the amended motion should have been considered, if at all, as a second Section 2255 motion. Under 28 U.S.C. 2244(b)(3), before a second or successive Section 2255 application may be filed in the district court, a petitioner must move in the appropriate court of appeals for an order authorizing the district court to consider the application. The court of appeals may authorize the filing of such a second or successive Section 2255 motion only if the motion either contains new evidence that establishes the defendant's innocence or sets forth a new rule of constitutional law that applies retroactively. 28 U.S.C. 2255, para. 8. Petitioner did not obtain authorization to file his second Section 2255 motion. Nor could he satisfy the requirements for such a second or successive motion. Those considerations also counsel in favor of denying certiorari.

c. The court of appeals correctly held that "the Sixth Circuit's prior refusal to characterize [petitioner's] Shelby County Jail time as an IAD 'term of imprisonment' foreclosed to him that avenue of relief." Pet. App. 6a. As this Court recognized in *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969), courts may decline to review a claim under Section 2255 when that

claim was raised and resolved on direct appeal. Furthermore, it is "well settled" in the courts of appeals "that a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances." *Jones* v. *United States*, 178 F.3d 790, 796 (6th Cir.), cert. denied, 528 U.S. 933 (1999); see, *e.g.*, *United States* v. *Sanin*, 252 F.3d 79, 83 (2d Cir.), cert. denied, 534 U.S. 1008 (2001); *United States* v. *Wiley*, 245 F.3d 750, 752 (8th Cir. 2001), cert. denied, 534 U.S. 1083 (2002); *United States* v. *Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000), cert. denied, 531 U.S. 1131 (2001); *United States* v. *DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). Petitioner has not provided any reason for the Court to deviate from that well-settled practice here.

The law-of-the-case doctrine, as the court of appeals explained, also prevented petitioner from relitigating in this Section 2255 proceeding an issue that was litigated and decided against him in his direct appeal. See Pet. App. 6a-7a. Under the law-of-the-case doctrine, "when an issue is once litigated and decided, that should be the end of the matter." *United States* v. *United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). The prior "decision should continue to govern the same issues in subsequent stages in the same case." *Arizona* v. *California*, 460 U.S. 605, 618 (1983). The law-of-the-case doctrine is vital to "promot[ing] the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quoting 1B James W. Moore, et al., *Moore's Federal Practice* ¶ 0.404[1], at 118 (1984)).

Petitioner provides no reason why the law-of-the-case doctrine does not apply to the "term of imprison-

ment" issue that he seeks to renew in his untimely second Section 2255 motion. This Court's intervening decision in *Bozeman* does not permit petitioner to relitigate the threshold IAD claim in this case. As explained above, although the Court in *Bozeman* held that Article IV(e) may bar further proceedings even if a prisoner's imprisonment is interrupted only for a day, see 533 U.S. at 149, "[t]he *Bozeman* decision * * * did not touch upon in any way the Sixth Circuit's [prior] interpretation of 'term of imprisonment' in this context." Pet. App. 6a; see *id.* at 15a-16a, 25a-26a.

d. On the merits, the court of appeals correctly held that petitioner was not yet serving his "term of imprisonment" for purposes of the IAD, because he was temporarily being held in a county jail pending his transfer to a state penitentiary. Pet. App. 6a-7a; see *id.* at 24a-27a. All of the federal courts of appeals, and a majority of the state courts of last resort, that have considered the issue, have adopted the Sixth Circuit's approach in this case. See, *e.g.*, *Crooker* v. *United States*, 814 F.2d 75, 77-78 (1st Cir. 1987); *United States* v. *Wilson*, 719 F.2d 1491, 1494-1495 & n.1 (10th Cir. 1983); *United States* v. *Harris*, 566 F.2d 610, 613 (8th Cir. 1977); *State* v. *Hargrove*, 45 P.3d 376, 379-384 (Kan.), cert. denied, 537 U.S. 982 (2002); *State* v. *Wade*, 772 P.2d 1291, 1294 (Nev. 1989); *Dorsey* v. *State*, 490 N.E.2d 260, 264 (Ind. 1986), overruled on other grounds, *Wright* v. *State*, 658 N.E.2d 563 (Ind. 1995). See also *Runck* v. *State*, 497 N.W.2d 74, 81-82 (N.D. 1993) (the IAD does not apply to a defendant held in a temporary facility pending his transfer to a correctional institution, so long as the length of his stay is not influenced by the existence of the detainer). Those decisions extend the well-established rule that the IAD does not apply to pretrial detainees. See, *e.g.*, *United States* v. *Glasgow*,

790 F.2d 446, 448 (6th Cir. 1985), cert. denied, 475 U.S. 1124 (1986); *United States* v. *Reed*, 620 F.2d 709, 711 (9th Cir.), cert. denied, 449 U.S. 880 (1980).

Although no federal court of appeals has held that the IAD applies to a convicted defendant temporarily housed in a local jail, two state courts of last resort have reached that conclusion. *Felix* v. *United States*, 508 A.2d 101, 103-108 (D.C. 1986) (rejecting IAD claim on other grounds); *Hughes* v. *District Court*, 593 P.2d 702, 705 (Colo. 1979). But the narrow conflict of authority that exists on this issue does not warrant this Court's review. Even if it did, this case would be a singularly ill-suited vehicle in which to attempt to address such a conflict. As discussed above, for several different reasons, petitioner's IAD claim is both untimely and procedurally barred.

2. Petitioner argues (Pet. 21-26) that this Court should review the more general question whether a prisoner who timely objects to an alleged violation of the IAD and has exhausted his direct appeals can ever seek relief under 28 U.S.C. 2255. That issue is not properly presented in this case, because, as explained above, petitioner did not properly preserve his IAD claim by filing it in a timely Section 2255 motion. In addition, as set forth above, because petitioner had not yet begun serving his "term of imprisonment," the IAD did not yet apply to petitioner, and thus petitioner did not have an IAD claim to preserve.

In any event, as petitioner observes, *Reed* v. *Farley*, 512 U.S. 339 (1994), "is often cited for the proposition that collateral review under 28 U.S.C. § 2254 or 28 U.S.C. § 2255 is not available for IAD violations." Pet. 22. See *Reed*, 512 U.S. at 359 (Scalia, J., concurring) ("Since the present petitioner raised his IAD claim on direct appeal * * * , his federal habeas claim could

have been rejected on the ground that the writ ordinarily will not be used to readjudicate fully litigated statutory claims."); see also *id.* at 352 (plurality opinion) ("a state court's failure to observe [a provision of the IAD] is not cognizable under § 2254 when the defendant registered no objection * * * and suffered no prejudice attributable to [that failure]"); *id.* at 354 (majority opinion) ("Where the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation'") (quoting *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977)).

Petitioner suggests that *Reed* "leaves open the possibility that under the proper circumstances, collateral review would be appropriate to correct a court's refusal to enforce the IAD." Pet. 22. But even if that were so, the lower courts in this case did not "refuse" to enforce the IAD. Rather, they held that the IAD was not applicable to petitioner, because he had not yet begun serving his "term of imprisonment" while he was in the county jail. Pet. App. 6a, 11a. Moreover, the district court declined to reach the broader question whether an IAD claim may ever be raised in a Section 2255 motion (*id.* at 12a-15a), and instead held that petitioner's particular IAD claim is "not cognizable on a § 2255 motion." *Id.* at 15a. In any event, petitioner has cited no conflict of authority in the courts of appeals as to whether, or under what circumstances, a statutory claim under the IAD is ever cognizable in a Section 2255 motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2003

Supreme Court, U.S.
FILED
OCT 3 2003
OFFICE OF THE CLERK

No. 03-127

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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SUMMARY OF THE REPLY ARGUMENT

The Petitioner's motion brought pursuant to 28 U.S.C. Section 2255 was properly amended, and the Government waived any objection to the amendment. The amendment was not a second or successive petition. An error in enforcing a statutory right should be evaluated in view of the result that would have obtained if the right had been properly applied in order to determine whether there has been a fundamental defect. Sentencing provides a bright line between those who are serving a sentence and those who are not; whether the place of confinement is called a jail or a prison is irrelevant. The exact same "policy" arguments that were made in *Alabama v. Bozeman*, 533 U.S. 146 (2001), to exempt brief shuttling are those that have been resurrected in claiming that a sentence does not begin until one is transferred to a place called a prison. This Court held in *Bozeman* that the clear language of the statute must be applied literally, and this Court must grant certiorari and apply that same logic to the present case, or lower courts will continue to invent alleged exceptions to prevent implementation of the Interstate Agreement on Detainers simply because they do not like the results of the plain language of the statute. Finally, there is a split in interpretation among various jurisdictions that could be resolved if this Court grants certiorari.

REPLY ARGUMENT

The Respondent's Brief goes to great lengths to claim a procedural default on the part of the Petitioner in the filing of his Section 2255 motion. In so doing, the Respondent implicitly acknowledges the strength of the Petitioner's sub-

stantive claim that the Interstate Agreement on Detainers (IAD) was violated. Nevertheless, Respondent's efforts must fail for several reasons.

First, the District Court permitted the Petitioner to amend, and such a decision can only be reviewed for an abuse of discretion. This situation is the mirror image of the cases cited by the Respondent in which a court's denial of an amendment was at issue. *See, e.g. United States v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002) ("We review for abuse of discretion a district court's decision concerning amendment of pleadings."); *United States v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000) ("We review the denial of a motion to amend a pleading for abuse of discretion.").

Second, there had been no response to Petitioner's initial Section 2255 motion at the time of the amendment. The Rules of Civil Procedure allow one to "amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a).

Moreover, this is the first time that Respondent has objected to the amendment on procedural grounds. The District Court stated:

> Ordinarily, this Court would not permit defendant to amend his § 2255 motion to assert this additional claim. Taylor's original § 2255 motion was filed only one day before the expiration of the one-year statute of limitations. Morever [sic], because this issue was litigated on direct appeal, *United States v. Taylor*, 173 F.3d at 540-42, § 2255

> relief is not available on this claim in the absence of extraordinary circumstances. *See supra* p. 4.
>
> In this case, however, this claim may not be summarily dismissed because Taylor is relying on a new Supreme Court decision Interstate Agreement on Detainers, *Alabama v. Bozeman*, 531 U.S. 1051 (2001), that was unavailable to him on direct appeal or when he filed his § 2255 motion. Accordingly, this claim merits a response from the Government.

Order Granting Motion to Proceed *In Forma Pauperis*, Order Denying in Part Motion Under 28 U.S.C. § 2255, Order Certifying Appeal not Taken in Good Faith, and Order to Respond to Remaining Claim, filed Sept. 13, 2001 in Cv. No. 00-3062-Ml/V & Cr. No. 96-20037-(Tu)Ml in the United States District Court for the Western District of Tennessee, Western Division, at pp. 16-17.[1] Normally, an affirmative defense such as the statute of limitations must be raised as soon as possible in order that it not be waived. *See, e.g.* Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense"). *See also*, *Paters v. United States*, 159 F. 3d 1043, 1048 n.7 (7th Cir. 1998) ("since the government has not chal-

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[1]Petitioner did not include this Order in the appendix to his Petition for Certiorari because it did not appear to be relevant. Since the Respondent has raised this issue, the Order would presumably be included in the Joint Appendix if certiorari is granted.

lenged the court's order requiring an answer, the issue is waived").

The Respondent's Brief also tries to characterize the amendment of the Section 2255 motion "as a second Section 2255 motion" which must be authorized by the appropriate court of appeals prior to filing. Respondent's Brief at 12. This also is the first time that this objection has been raised by the Government, and it also must fail. In *United States v. Hicks*, 283 F.3d 381 (D.C. Cir. 2002), the court explained the difference between an amendment and a supplemental pleading, and the same distinction should apply to an amendment and a successive petition. Hicks had moved the court to add a claim to his pending Section 2255 motion incorporating the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which had been released while his motion was still pending. The D.C. Circuit stated:

> [W]e believe that Hicks' motion seeking to add an *Apprendi* claim to his pending § 2255 request is better understood as an amendment than as a supplemental pleading. The distinguishing feature of the latter is that it sets forth "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). . . Supplements therefore contrast with amendments, which typically rest on matters in place prior to the filing of the original pleading.
>
> The question in this case is whether intervening judicial decisions are the sort of "occurrences or

> events" to which Rule 15(d) refers. We think not. The purposes to which the rule is typically put support the conclusion that the appropriate bases for supplemental pleadings are new facts bearing on the relationship between the parties, rather than merely changes in the law governing those facts.

United States v. Hicks, 283 F.3d 381, 385-386 (D.C. Cir. 2002) (some citations omitted). Therefore, Petitioner was properly allowed to amend his petition and was not required to receive prior approval of the appellate court as would have been required for a second petition.

Petitioner's amendment, besides being allowed at the discretion of the trial court, was timely filed because it was brought within one year of "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed." 28 U.S.C. § 2255. Certainly, there was an impediment created by the failure of the government to enforce literally a law of the United States, namely, the IAD. However, as noted by the district court, the Petitioner had fully litigated this issue on direct appeal and had lost and was consequently barred from raising the issue again under Section 2255. In other words, the Government, which is so leery of enforcing the technicalities of the IAD when it comes to its own actions, is delighted to crow about the technicalities of Section 2255 because it thinks that those technicalities place the Petitioner in a "catch-22" in which he is prevented from raising an issue in an initial filing and then prevented by a time limitation from raising it on amendment when this

Court has vindicated his original position. Under the demands of justice, this cannot be so! This Court issued the *Bozeman* opinion while Petitioner's Section 2255 motion was still pending, and Petitioner had one year or until such time as the trial court ruled upon the motion, whichever was shorter, to amend his motion. He amended before the trial court had ruled, before the Government had responded, and before a year from the issuance of the *Bozeman* opinion had expired.

The Respondent also asserts that Petitioner's IAD claim is not cognizable on a Section 2255 motion. The Petitioner urges the Court to recognize that the proper standard for determining whether there has been a "fundamental defect" for purposes of Section 2255 review is not whether the law violated is "technical" (many laws, and certainly the IAD are very technical), but rather the inquiry should be whether a significantly different result would have occurred if the law had been implemented. In the present case, the required dismissal of the indictment is an enormous difference which makes the failure to enforce the plain language of the IAD a fundamental defect that does permit review under Section 2255.

The Respondent attempts to gloss over whether *Bozeman* requires a literal enforcement of the IAD by claiming that one begins serving a sentence of imprisonment not when the sentence is pronounced but at some later indeterminate time when one is transferred to something called a prison. The cases cited by the Respondent all bring out the "policy" reasons stating that the reason for the anti-shuttling clause is not

clause is not to impede rehabilitation and that the prisoner will not have started any rehabilitation programs as long as he is still in jail. This is exactly the same argument that was made in *Bozeman* when it was argued that shuttling for a brief stay would not interrupt rehabilitation, and this Court soundly rejected that argument in favor of a strict interpretation of the plain language of the statute. The literal interpretation required since *Bozeman* does mandate reversal of the jail versus prison distinction that has been imposed on the Petitioner; because the plain language of the IAD gives it effect, the IAD cannot have nuanced meanings added to its terms. Nevertheless, the contortions that the courts have gone to in order to avoid the plain language of the IAD make it necessary that this Court speak again as it did in *Bozeman*.[2] Without clear direction from this Court, the lower courts will continue to pretend to find other "exceptions" to the IAD that "the *Bozeman* decision did not touch upon."

Finally, the Respondent's Brief suggests that the issue is not worthy of being granted certiorari because there is an insignificant split in interpretation of the jail or prison issue and that only "two state courts of last resort have reached"

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[2]One is reminded of St. Thomas Aquinas' commentary on why laws must be enforced: "Ad primum ergo dicendum quod homines bene dispositi melius inducuntur ad virtutem monitionibus voluntariis quam coactione, sed quidam male dispositi non ducuntur ad virtutem nisi cogantur." *Summa Theologiae*, I^a-II^{ae} q. 95 a. 1 ad 1. Many lower courts have such a reluctance to enforce the IAD that they will never do so unless they are coerced; *Bozeman* was evidently not enough to induce these recalcitrants to do what is right.

the conclusion that the IAD applies to a sentenced prisoner who is temporarily housed in a jail. Respondent's Brief at 15. As a preliminary matter, if the interpretation that the IAD does not apply to a sentenced prisoner in a jail is incorrect, it should not matter whether any jurisdictions accept a contrary view. However, it should be noted that the split among jurisdictions is greater than just those in which a court of last resort has ruled on the issue. *See, e.g., Escalanti v. Superior Court*, 165 Ariz. 385, 799 P.2d 5 (Ariz. Ct. App. 1990), and *State v. Lock*, 839 S.W.2d 436 (Tenn. Ct. Crim. App. 1992), in addition to *Felix v. United States*, 508 A.2d 101 (D.C. Ct. App. 1986), and *Hughes v. District Court*, 197 Colo. 396, 593 P.2d 702 (1979). *Cf. Runck v. State*, 497 N.W.2d 74, 81 (N.D. 1993) (rejecting a blanket interpretation that would never make the protections of the IAD applicable to sentenced prisoners being held in a jail). The idea that the IAD applies to sentenced prisoners in jails is also not unknown among the circuit courts of appeal. In *United States v. Palmer*, 574 F.2d 164 (3rd Cir. 1978), the defendant had been shuttled from the Erie County Jail where he was serving a state sentence. The opinion noted that "[t]he parties do not dispute that a violation of the IAD in fact took place," but the Third Circuit held that Palmer had waived his IAD claim by pleading guilty before filing a motion to dismiss based on the IAD shuttling violation. In *United States v. Umbower*, 602 F.2d 754 (5th Cir. 1979), the defendant was incarcerated in the Bucks County Jail serving a probation violation on a state sentence. He had detainers lodged against him by the Southern District of Florida and by the State of New Jersey. For some reason, the defendant was

brought to before a magistrate in the Eastern District of Pennsylvania and then returned to the jail. The Fifth Circuit seemed to presume that this would have been shuttling but for the fact that the defendant had never arrived in the jurisdiction that had authority to resolve his detainer. In *United States v. Trammel*, 813 F.2d 946 (7th Cir. 1987), the defendant was in the Milwaukee House of Corrections, a county facility, pending his transfer to a Wisconsin state prison, when he was brought to federal court and returned pursuant to a writ of *habeas corpus ad prosequendum*. The Seventh Circuit found this not to be shuttling, not because the defendant was in a jail, but rather because a detainer had not been lodged until a week after the transfer. In short, there is a significant split among the various jurisdictions that requires resolution by this Court.

CONCLUSION

There was no procedural default and the petition for a writ of certiorari should be granted in order to resolve the questions presented for review.

Respectfully submitted,

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